

154 FERC ¶ 61,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Norman C. Bay, Chairman;
Cheryl A. LaFleur, Tony Clark,
and Colette D. Honorable.

Reliant Energy Seward, LLC
NRG Wholesale Generation LP

Docket Nos. ER04-1164-001

NRG Wholesale Generation LP
Seward Generation, LLC

ER16-413-000

NRG Wholesale Generation LP
Seward Generation, LLC

EL16-28-000
(Not Consolidated)

ORDER ACCEPTING INFORMATIONAL FILING, GRANTING WAIVER,
INSTITUTING SECTION 206 PROCEEDING, AND ESTABLISHING HEARING
AND SETTLEMENT JUDGE PROCEDURES

(Issued January 14, 2016)

1. On November 25, 2015, in Docket No. ER04-1164-001, NRG Wholesale Generation LP (NRG) submitted an informational filing pursuant to Schedule 2 to the PJM Interconnection, L.L.C. (PJM) Open Access Transmission Tariff (OATT), regarding the reactive power rates for the Seward Generating Facility (Facility), the planned sale of that facility from NRG to Seward Generation LLC (Seward), and the transfer of the Facility's revenue requirement for reactive supply and voltage control service as part of the transaction (Informational Filing). On December 8, 2015, in Docket No. ER16-413-000, NRG and Seward submitted a request for a one-time waiver of the 90-day prior notice requirement set forth in Schedule 2 of the PJM OATT to facilitate the planned sale of the Facility (Waiver Request). In this order, we accept the Informational Filing and grant the Waiver Request.¹ We also institute a proceeding pursuant to section 206 of the

¹ We take this opportunity to clarify the Commission filing requirements for utilities making informational filings under Schedule 2. Utilities that have established an eTariff for reactive power should make their informational filing using eTariff Type of Filing Code 80 (Compliance Filing) using the same filing number used for the reactive power tariff. This will assure that the filing receives a subdocket related to the original reactive power tariff filing. Companies whose reactive power tariffs are not yet in eTariff also should make their informational filing using eTariff Type of Filing Code 80

(continued...)

Federal Power Act (FPA),² regarding the continued justness and reasonableness of NRG's reactive power rates.³

I. Informational Filing and Waiver Request

2. Schedule 2 of the PJM Tariff, which covers Reactive Service, provides that PJM will compensate owners of generation and non-generation resources for maintaining the capability to provide reactive power to PJM. Specifically, Schedule 2 states that, for each month of Reactive Service provided by generation and non-generation resources in the PJM region, PJM shall pay each resource owner an amount equal to the resource owner's monthly revenue requirement, as accepted or approved by the Commission.⁴ Schedule 2 requires that at least 90 days before deactivating or transferring a resource receiving compensation for reactive supply and voltage support, the resource owner either:

(1) submit a filing to either terminate or adjust its cost-based rate schedule to account for the deactivated or transferred unit; or (2) submit an informational filing explaining the basis for the decision by the Reactive Power Supplier not to terminate or revise its cost-based rate schedule.

3. On November 25, 2015, NRG submitted the Informational Filing pursuant to Schedule 2. In the Informational Filing, NRG states no revisions to the Reactive Power Tariff are being proposed, because the revenue requirement set forth therein was established solely for the Seward Generating Station and the entirety of that facility and the Reactive Power Tariff are being transferred to Seward.⁵ NRG states that following the consummation of the sale, the Facility will continue to provide reactive supply and

(Compliance Filing), without a referenced filing number, and with a tariff record for their current reactive power rate schedule. In addition, we encourage companies with reactive power rate schedules who are currently in the M (market based rate) program in company registration to change their program registration to the E (traditional cost of service).

² 16 U.S.C. § 824e (2012).

³ We note that throughout this order, reference to NRG's reactive power rates is exclusive to Reliant Energy Seward LLC's Reactive Power Tariff acquired by NRG, as established in Docket No. ER04-1164-000.

⁴ PJM, Intra-PJM Tariffs, OATT, Schedule 2 (3.1.0).

⁵ NRG and Seward filed a request to transfer jurisdictional facilities pursuant to section 203 of the Federal Power Act on December 1, 2015 in Docket No. EC16-45-000, which is pending Commission consideration.

voltage control service to PJM on the same basis.⁶ NRG and Seward state that in connection with the transaction, NRG and Seward will be seeking various regulatory approvals and third-party consents. Other than the expiration of the 90-day notice period that is the subject of this waiver request, all of these approvals and consents are expected to be obtained by mid- to late January 2016.

4. In the Waiver Request, NRG and Seward seek a one-time waiver of the 90-day prior notice requirement which requires NRG to have submitted the Informational Filing 90 days prior to the planned transfer of the Facility. NRG and Seward state that NRG currently receives compensation for reactive supply and voltage control service from the Facility. NRG and Seward request the Commission issue an order granting the waiver, with immediate, prospective effect, on or before January 15, 2016.⁷

5. NRG and Seward state that good cause exists to grant the 90-day prior notice requirement. NRG and Seward state that granting the waiver will facilitate the transfer of the Facility to Seward and allow the parties to consummate the sale as soon as possible after other regulatory approvals and third-party consents have been obtained, rather than waiting until February 23, 2016.⁸ NRG and Seward state that in past cases the Commission has granted tariff waivers under similar circumstances where the: (1) movants have acted in good faith; (2) the waiver is of limited scope; (3) the waiver would address a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.⁹

6. NRG and Seward state that they have acted in good faith by submitting the Informational Filing on November 25, 2015, just one day after executing the Asset Purchase Agreement on November 24, 2015. NRG states that it has maximized the prior notice to the Commission and to the public of the transfer of the Facility that is receiving reactive power compensation. NRG and Seward state the waiver is limited in scope, and that NRG and Seward are only requesting a one-time waiver of the deadline under Schedule 2. NRG states that the requested waiver is necessary to address the concrete problem that, absent a waiver, NRG and Seward will not be able to consummate the Transaction until 90 days after the submittal of the informational filing. NRG states they

⁶ NRG, Informational Filing, Docket No. ER04-1164-001 at 4.

⁷ NRG and Seward, Joint Request for Waiver, Docket No. ER16-413-000, at 1 (filed November 25, 2015) (Waiver Request).

⁸ *Id.* at 7.

⁹ *Id.* at 7 (citations omitted).

are not requesting waiver of any substantive requirements under Schedule 2, and that granting the waiver will have no undesirable consequences or harm on third parties.¹⁰

7. NRG states that the Reactive Power Tariff for the Facility was originally filed by Reliant Energy Seward, LLC in Docket No. ER04-1164-000 and was accepted by a delegated letter order issued in that proceeding on October 18, 2004. NRG states that NRG (then known as Reliant Energy Wholesale Generation, LLC) acquired, and succeeded to, the Reactive Power Tariff when Reliant Seward was merged with, and into, NRG Wholesale on December 1, 2008.¹¹ NRG states that the Facility is a 525 MW waste coal facility that has an actual megavolt-ampere reactive (MVAR) capability of 248 MVARs at the generator terminals, while the nameplate rating is 257 MVARs.¹²

II. Notice and Responsive Pleadings

8. Notice of NRG's Informational Filing was published in the *Federal Register*, 80 Fed. Reg. 76,679 (2015) with interventions and protests due on or before December 16, 2015. No interventions or protests were filed.

9. Notice of NRG and Seward's Waiver Request was published in the *Federal Register*, 80 Fed. Reg. 75,676 (2015), with interventions and protests due on or before December 16, 2015. PJM submitted a timely motion to intervene.

III. Discussion

A. Procedural Matters

10. Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (2015), PJM's timely, unopposed motion to intervene serves to make it a party to this proceeding.

¹⁰ *Id.* at 7-8.

¹¹ Informational Filing at 3 (filed November 25, 2015) (Informational Filing). Under Order No. 714, when existing tariffs or agreements need to be modified to reflect changes in names or ownership, the utility is required at the time of the transaction to make a baseline filing to include the tariff or agreement in eTariff. *Electronic Tariff Filings*, Order No. 714, FERC Stats. & Regs. ¶ 31,276, at P 93 (2008). NRG, therefore, should have filed its reactive power tariff in eTariff when it acquired the Facility in 2008.

¹² Informational Filing at 4-5. NRG states that the Facility's actual megavolt-ampere (MVA) capability is 583 MVA, while the nameplate rating is 591 MVAs.

B. Substantive Matters

11. We accept NRG's Informational Filing for informational purposes only. We also find good cause exists to grant NRG and Seward's request for waiver of the 90-day prior notice requirement set forth in Schedule 2 of the PJM OATT. We also establish a proceeding under section 206 of the FPA to determine whether NRG's reactive power rates remain just and reasonable. We further establish a refund effective date and hearing and settlement judge procedures.

12. The Commission has previously granted requests for waiver from a Regional Transmission Organization's tariff requirements in situations where: (1) the applicant is unable to comply with the tariff provision at issue in good faith; (2) the waiver is of limited scope; (3) the waiver addresses a concrete problem; and (4) the waiver does not have undesirable consequences, such as harming third parties.¹³ We find that NRG and Seward's requested waiver satisfies these conditions.

13. First, we find that NRG and Seward have acted in good faith. NRG and Seward, by submitting the Informational Filing one day after executing the Asset Purchase Agreement, maximized the prior notice to the Commission and to the public of the transfer of the Facility. Second, we find that NRG and Seward's requested waiver is of limited scope. NRG and Seward are requesting a one-time waiver of the deadline required under Schedule 2. Third, we find that the waiver will remedy a concrete problem. Absent this waiver NRG and Seward will not be able to consummate the Transaction until 90 days after the submittal of the Informational Filing by NRG. Delaying the consummation of the transaction will be commercially disadvantageous to NRG and Seward. Finally, we find that granting NRG and Seward's request for waiver will not lead to undesirable consequences. The Reactive Power Tariff sets forth a revenue requirement for reactive supply and voltage control service that is specific to the Facility and it will be transferred to Seward along with the entire Facility. No resource is being transferred out of a fleet, and NRG will not continue to receive compensation for reactive supply and voltage support from the Facility.

14. We further find that NRG's revenue requirement for Reactive Service provided by the Facility and established in Docket No. ER04-1164-000¹⁴ raises issues of material fact that cannot be resolved based on the record before us, and that are more appropriately addressed in the hearing and settlement judge procedures ordered below. Accordingly,

¹³ *E.g., PJM Interconnection, L.L.C.*, 146 FERC ¶ 61,033 (2014); *PJM Interconnection, L.L.C.*, 137 FERC ¶ 61,184, at P 13 (2011).

¹⁴ Informational Filing at 2.

we are instituting a proceeding under section 206 of the FPA in Docket No. EL16-28-000, into the justness and reasonableness of NRG's reactive power rates, and establish a refund effective date and hearing and settlement judge procedures. Although we are setting NRG's revenue requirement for Reactive Service for hearing in its entirety we note that use of Locational Marginal Price to calculate Heating Losses may result in over-recovery.¹⁵

15. In cases where, as here, the Commission institutes a section 206 investigation on its own motion, section 206(b) of the FPA requires that the Commission establish a refund effective date that is no earlier than the date of the publication by the Commission of notice of its intention to initiate such proceeding nor later than five months after the publication date.¹⁶ In such cases, in order to give maximum protection to customers, and consistent with our precedent, we have historically tended to establish the section 206 refund effective date at the earliest date allowed by section 206, and we do so here as well.¹⁷ That date is the date of publication of notice of initiation of the section 206 proceeding in Docket No. EL16-28-000 in the *Federal Register*.

16. Section 206(b) of the FPA also requires that, if no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of the section 206 proceeding, the Commission shall state the reason why it has failed to render such a decision and state its best estimate as to when it reasonably expects to make such a decision. As we are setting the section 206 proceeding in Docket No. EL16-28-000 for hearing and settlement judge procedures, we expect that, if the proceeding does not settle, we would be able to render a decision within eight months of the date of filing of briefs opposing exceptions to the Initial Decision. Thus, if the Presiding Judge were to issue an Initial Decision by December 31, 2016, we expect that, if the proceeding does not settle, we would be able to render a decision by October 31, 2017.

17. While we are setting these matters for a trial-type evidentiary hearing, we encourage the participants to make every effort to settle their dispute before hearing procedures commence. To aid the participants in their settlement efforts, we will hold the hearing in abeyance and direct that a settlement judge be appointed, pursuant to Rule 603

¹⁵ See Reliant Energy Seward, LLC, Attachment 1 (Testimony of John L. Simpson), Docket No. ER04-1164-000, at 18 (filed Aug. 31, 2004); *Dynegy Midwest Generation, Inc.*, 125 FERC ¶ 61,280, at P 35 (2008).

¹⁶ 16 U.S.C. § 824e (b) (2012).

¹⁷ See, e.g., *Idaho Power Co.*, 145 FERC ¶ 61,122 (2013); *Canal Electric Co.*, 46 FERC ¶ 61,153, *order on reh'g*, 47 FERC ¶ 61,275 (1989).

of the Commission's Rules of Practice and Procedure.¹⁸ If the participants desire, they may, by mutual agreement, request a specific judge as the settlement judge in the proceeding; otherwise the Acting Chief Judge will select a judge for this purpose.¹⁹ The settlement judge shall report to the Acting Chief Judge and the Commission within thirty days of the date of the appointment of the settlement judge, concerning the status of settlement discussions. Based on this report, the Acting Chief Judge shall provide the participants with additional time to continue their settlement discussions or provide for commencement of a hearing by assigning the case to a presiding judge.

The Commission orders:

(A) NRG's Informational Filing is hereby accepted as an informational filing only, as discussed in the body of this order.²⁰

(B) NRG and Seward's request for waiver of the 90-day prior notice requirement set forth in Schedule 2 of the PJM OATT is hereby granted, as discussed in the body of this order.

(C) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Commission by section 402(a) of the Department of Energy Organization Act and by the FPA, particularly section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the FPA (18 C.F.R. Chapter I), the Commission hereby institutes a proceeding in Docket No. EL16-28-000, concerning the justness and reasonableness of NRG's Reactive Power Tariff, as discussed in the body of this order. However, the hearing shall be held in

¹⁸ 18 C.F.R. § 385.603 (2015).

¹⁹ If the participants decide to request a specific judge, they must make their joint request to the Acting Chief Judge by telephone at (202) 502-8500 within five days of this order. The Commission's website contains a list of Commission judges available for settlement proceedings and a summary of their background and experience (<http://www.ferc.gov/legal/adr/avail-judge.asp>).

²⁰ This acceptance for filing shall not be construed as constituting approval of any service, rate, charge, classification, or any rule, regulation, contract, or practice affecting such rate or service contained in the Informational Filing; nor shall such acceptance be deemed as recognition of any claimed contractual right or obligation associated therewith; and such action is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against NRG.

abeyance to provide time for settlement judge procedures, as discussed in Ordering Paragraphs (D) and (E) below.

(D) Pursuant to Rule 603 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.603 (2015), the Acting Chief Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen days of the date of this order. Such settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable after the Acting Chief Judge designates the settlement judge. If the participants decide to request a specific judge, they must make their request to the Acting Chief Judge within five days of the date of this order.

(E) Within thirty days of the appointment of the settlement judge, the settlement judge shall file a report with the Commission and the Acting Chief Judge on the status of the settlement discussions. Based on this report, the Acting Chief Judge shall provide the participants with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every sixty days thereafter, informing the Commission and the Acting Chief Judge of the participants' progress toward settlement.

(F) If settlement judge procedures fail and a trial-type evidentiary hearing is to be held, a presiding judge, to be designated by the Acting Chief Judge, shall, within fifteen days of the date of the presiding judge's designation, convene a prehearing conference in these proceedings in a hearing room of the Commission, 888 First Street, NE, Washington, DC 20426. Such a conference shall be held for the purpose of establishing a procedural schedule. The presiding judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(G) The Secretary shall promptly publish in the *Federal Register* a notice of the Commission's initiation of the proceeding under section 206 of the FPA in Docket No. EL16-28-000.

(H) The refund effective date in Docket No. EL16-28-000 established pursuant to section 206 of the FPA shall be the date of publication in the *Federal Register* of the notice discussed in Ordering Paragraph (G) above.

By the Commission.

(S E A L)

Nathaniel J. Davis, Sr.,
Deputy Secretary.